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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 379.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITION FOR MODIFICATION OF CONCLUSION.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondent prays that the conclusion of a general reversal ordered in the judgment rendered on March 2, 1936, be modified in the following respect:

We bow to the unanimous opinion of the Court as to the points ruled upon. However, there is in the record at page 284 an assignment of error, number 6, reading as follows:

> "(6) The Board of Tax Appeals erred in deciding that the value of the land and improvements at Novem-

ber 30, 1916, was not the basis of the property for the years involved, for purposes of invested capital."

The "years involved," as to *invested capital* are 1920 and 1921, and the relevant portions of the petitions for those years are at pages 66 (year 1920) and 103 (year 1921). The allegation at page 66 is typical, and reads as follows:

> "(1) That the Commissioner failed and refused to permit the San Joaquin Fruit Company to include in its invested capital for the calendar year 1920 the sum of $1,659,372.85, which represents the disallowance of surplus arising from a closed transaction which occurred on November 30, 1916, on which date the San Joaquin Fruit Company exercised an option to acquire certain improved real estate, which option had been acquired on October 13, 1906, and had steadily and continuously increased in value through the ten-year period and on the date of its exercise had a market value of $1,659,372.85."

The Circuit Court of Appeals did not rule upon the assignment of error, apparently because it ruled in our favor upon another ground. The assignment of error is not yet ruled upon. The question raised by the assignment is whether the land, having been acquired (as this Court has now held) in 1916, in part as the result of ten years of effort and work, the value of the land as of 1916 became part of the *earned surplus and undivided profits* for the years *subsequent* to 1916. Under section 326(a)(3) of the Revenue Act of 1918, 40 Stat. (Ch. 18) 1057, 1092, earned surplus and undivided profits are included in the statutory term "invested capital." There is not involved a mere book write-up, as in *La Belle Iron Works* v. *U. S.*, 256 U. S. 377, but the actual occurrence of a real event, *i. e.*, an acquisition on November 30, 1916, of land by way of final realization of ten years of effort and work, when an option of very high value was merged into the fee of the land.

We should have a ruling on the assignment of error (*Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 796-797), and therefore respectfully petition either that there be a direction to the Court below to rule upon it, or that this Court rule upon it.

Respectfully,

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